The Economic Value of Conserved Land: Examining Whether Conservation Easements Represent a Sufficient Source of Land Value to Influence the Outcome of Regulatory Takings Claims

WILLIAM C. MEANS, JR.*

I. INTRODUCTION

Many scholars and practitioners of environmental law believe that today's environmental problems are getting worse as the result of an "environmental logjam" in the United States.[1] The "logjam" refers to the fact that the United States' regulatory infrastructure is outdated, problematic, and inadequate to address new challenges such as climate change.[2] A number of environmental law scholars and practitioners converged upon New York in late March 2008 in order to discuss possible approaches to breaking this "logjam," the results of which will be compiled in a report for the next Congress and President.[3] The political scene provided an optimistic backdrop for this conference. For example, each of the three top presidential candidates at the time claimed that taking care of the environment, particularly with respect to climate change and the promotion of clean and renewable energy, was among his or her top priorities.[4] In its first year under Democratic

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* Associate Editor, *Ohio State Law Journal*, J.D., The Ohio State University Moritz College of Law, expected 2009. B.A. in English and Religious Studies, Kenyon College, 2002. I thank Professor Annecoos Wiersema for her generous and helpful contributions to the development of this Note.

[1] *See, e.g.*, New York University School of Law, Symposium, *Background of the Breaking the Logjam Project*, http://www1.law.nyu.edu/conferences/btl/background.html (last visited Oct. 16, 2008) [hereinafter *Breaking the Logjam*].

[2] *Id.* The United States' environmental regulatory structure was mostly developed in the 1970s and 1980s. *Id.* Among the failings shared by most environmental statutes are compartmentalization, hidden trade-offs, misappropriation of enforcement authority, and the dominance of command-and-control regulations. *Id.*

[3] *Id.*

[4] As of March 2008, three presidential candidates remained: Hillary Clinton, Barack Obama, who would eventually win the election, and John McCain. Hillary Clinton enjoys an eighty-seven percent lifetime voting score from the League of Conservation Voters and places clean energy and global warming among the top issues in her campaign. *See* Clinton Campaign, Powering America's Future: New Energy, New Jobs, http://web.archive.org/web/20080208014657/http://www.hillaryclinton.com/issues/ (last visited Nov. 17, 2008); Grist, Clinton on the Issues, http://www.grist.org/feature/2007/08/09/clinton_factsheet/ (last visited Nov. 17, 2008). In a speech given in

leadership since 1994, Congress passed legislation that caused the League of Conservation Voters to claim that "2007 may well be remembered as a turning point for the environment."[5] Moreover, congressional Democrats expanded their majority in the 2008 election cycle.[6] The corporate setting, like its political equivalent, has witnessed an increased response to environmental concerns, particularly in the areas of climate change and sustainable energy.[7] Finally, and perhaps most importantly, recent public

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Des Moines, Iowa, on Oct. 14, 2007, Barack Obama said, "I don't believe that climate change is just an issue that's convenient to bring up during a campaign. I believe it's one of the greatest moral challenges of our generation." *See* Obama Campaign, Energy & Environment, http://web.archive.org/web/20080222011959/http://www.barackobama.com/issues/energy/ (last visited Nov. 17, 2008). Sen. Obama enjoys an eighty-six percent lifetime voting score from the League of Conservation Voters and earned significant environmental cachet in response to an October 2007 speech in New Hampshire that unveiled an aggressive climate and energy plan. Grist, Obama on the Issues, http://www.grist.org/feature/2007/07/30/obama_factsheet/ (last visited Nov. 17, 2008). John McCain paints himself as a common sense steward of the land, focused on conserving natural resources and addressing global warming. McCain Campaign, Steward of Our Nation's Rich Natural Heritage, at http://www.johnmccain.com/Informing/Issues/65bd0fbe-737b-4851-a7e7d9a37cb278db.htm (last visited Nov. 17, 2008). Sen. McCain, considered one of the "greenest" Republicans, has been a leader in Congress on the issue of global warming and named it one of three key issues for his presidency. Grist, McCain on the Issues, http://www.grist.org/feature/2007/10/01/mccain_factsheet/ (last visited Feb. 22, 2008); Scott Condon, *McCain: No Compromise*, ASPEN TIMES, Aug. 16, 2007, at A1.

[5] LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD 2 (2007), *available at* http://lcv.org/scorecard/2007.pdf. Even within the Democratic Party, there are signs that environmental concerns may get more attention going forward. For example, Democratic Rep. John Dingell, Chairman of the Energy and Commerce Committee and long-time opponent of the environmental movement, is having trouble exerting his power on Capital Hill. Glenn Hurowitz, *Dingell Versus the Democrats*, AM. PROSPECT, Aug. 7, 2007, *available at* http://www.prospect.org/cs/articles?article=dingell_vs_the_democrats ("[T]he reason for Dingell's decreasing power is that he's become rather unpopular within a Democratic caucus that's . . . increasingly unwilling to accept his . . . open war with the environmental movement.").

[6] Michael M. Grynbaum & David M. Herszenhorn, *Democrats Pick Up at Least 5 Senate Seats*, N.Y. TIMES, Nov. 4, 2008.

[7] Ceres, 2007 Proxy Season Produces Strong Results on Climate Change, http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=428&srcid=554 (last visited Nov. 18 2008) ("Investors engaging with US companies on the financial risks and opportunities from climate change had their most successful year to date during the 2007 proxy season."); Ceres, Annual Report 2006 & Beyond, at 4–7, http://www.ceres.org/NETCOMMUNITY/page.redir?target=http%3a%2f%2f216.235.201.250%2fNETCOMMUNITY%2fDocument.Doc%3fid%3d137&srcid=592&erid=0 (last visited Nov 18, 2008) (highlighting successful efforts to educate and mobilize investors on issues such as climate change and sustainability, and describing programs connecting stakeholders with corporate directors).

opinion polls have shown that the majority of Americans believe that there is "too little" government regulation and involvement in the area of environmental protection.[8] Thus, largely due to energy and climate change concerns, the United States appears poised to begin a new era in environmental regulation.

One of the most common ways for a government to address environmental concerns is to regulate the private use of land and other natural resources.[9] Because land use restrictions usually have a negative impact on the economic value of privately owned property, breaking the environmental "logjam" in the United States will almost certainly result in a flood of social and legal conflict. This Note will focus upon the legal conflict that manifests itself in claims made under the Takings Clause of the Fifth Amendment. The Supreme Court of the United States has held that some regulations so severely undermine the economic value of private property that the government, despite not physically "taking" the property, has nonetheless done the functional equivalent thereof, and therefore must pay just compensation for the resulting loss in land value.[10] The Court, however, has not defined with any precision the degree of loss that triggers protection under the Fifth Amendment.[11] The resulting uncertainty provides fertile

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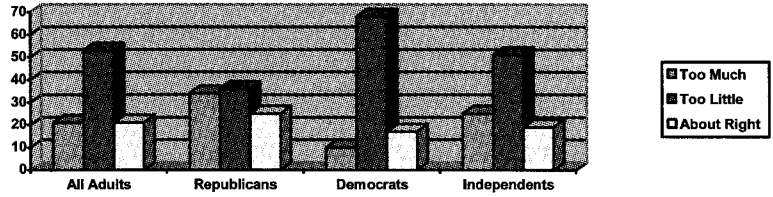
[8] The Harris Poll, Oct. 16–23, 2007, *available at* http://www.pollingreport.com/enviro.htm. The chart below reflects the opinions of the American populace regarding the amount of environmental protection that state and federal regulatory schemes currently provide. The fact that a very high percentage of Democrats believe there is "too little" environmental regulation highlights the significance of a Democratic congressional majority. However, it must be noted that, even among Republicans, more individuals believe there is "too little" environmental regulation rather than "too much." *Id.*



[9] Craig T. Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 510 (2007) (discussing the many ways in which land use regulations have and may be used in ecosystem protection).

[10] Lingle v. Chevron, 544 U.S. 528, 539 (2005).

[11] *Id.* at 539–40; William W. Wade, *"Sophistical and Abstruse Formulas" Made Simple: Advances in Measurement of* Penn Central*'s Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts*, 38 URB. LAW. 337, 349 (2007).

ground for the ever-growing and, arguably, irreconcilable conflict between proponents of land use regulation and supporters of private property rights.[12]

This conflict is exacerbated in the context of environmental regulation because, historically, the United States has placed little economic value upon the ecological qualities of land.[13] As a result, regulations designed to preserve ecological qualities generally impose significant damage upon the economic value of the regulated land, thereby providing the owners of such land with a strong claim to just compensation under the regulatory takings doctrine. Most governmental entities in the United States have limited budgets and are therefore unable to pass legislation that would require just compensation payments.[14] Thus, the regulatory takings doctrine, combined with the low economic values traditionally associated with the ecological

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[12] Harvey M. Jacobs, *New Actions or New Arguments Over Regulatory Takings?*, 117 YALE L.J. POCKET PART 66, 69–70 (2007) (concluding that the two sides—proponents of regulation on one and the private property rights movement on the other—are not amenable to the idea of compromise). The battles that arise from this conflict take place in both the courts and the legislatures. *See* Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1520 (2007) (examining several 2006 state ballot initiatives that proposed mandatory compensation payments for *any* regulation that diminishes private land values to *any* degree).

[13] In the posthumous publication of *A Sand County Almanac* in 1949—considered a landmark book in the environmental movement—Aldo Leopold criticized American conservation efforts based upon economic motives because ecological qualities of land had no economic value and thus went unaccounted in such a system. *See* ALDO LEOPOLD, A SAND COUNTY ALMANAC 237–64 (Carolyn Clugston Leopold & Luna B. Leopold eds., Ballantine Books 1970) (1949). As a result, Leopold believed that ecological conservation, to be successful, must be based upon the development of a "land ethic" whereby society departs from the idea that land is property and instead accepts the idea that the soil, water, plants, and animals making up the land are, along with humans, members of the same community. *See id.* In other words, Leopold believed that conservation could only be achieved if humans developed and acted upon a sense of right and wrong with respect to their relationship with the ecological qualities of land. *See id.* The concept of this Note was developed in large part upon the hypothesis that the emerging market in conservation easements represent Leopold's land ethic as manifested in the monetary decisions of a small number of rational individuals.

[14] *See, e.g.*, John Echeverria, *The Takings Issue*, *in* LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT 143, 143–48 (John Echeverria & Raymond Booth Eby eds., 1995) ("There can be little doubt that an expanded reading of the Takings Clause would in fact increase the cost of existing environmental programs and reduce the level of environmental protection Americans currently enjoy."). *But see* Jonathan A. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 302–05 (2008) (arguing that economic theory and empirical research demonstrates that failing to compensate private landowners for the costs of regulation discourages voluntary conservation efforts and encourages the destruction of environmental resources).

qualities of land, form a substantial legal impediment to enforcing regulations that severely restrict land use for the purpose of preserving environmental quality.

In 2005, the Supreme Court's decision in *Lingle v. Chevron* reinforced the economic-based takings problems that are presented in the context of environmental regulations.[15] Justice O'Connor announced that the main goal of the Court's takings analysis is to "identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[16] In order to calculate such equivalence, O'Connor continued, the Court's analysis must "focus[] directly upon the *severity of the burden* that government imposes upon private property rights."[17] Refocusing regulatory takings analysis upon the severity of the regulatory burden eliminates many of the tangential issues surrounding land use regulations from the purview of the courts—meaning that, for example, the legitimacy of a government's environmental concerns will not affect the courts' analysis.[18] As a result, environmental regulations will be evaluated primarily upon the degree of economic impact they have upon a claimant. Proponents of environmental regulations must respond to the functional equivalence notion of takings by developing arguments that support the remaining economic value of the land affected by such regulations.

This Note examines whether conservation easements may serve as a source of such arguments for proponents of environmental regulations defending takings claims. Before proceeding with this examination, however, this Note provides a foundational understanding of the regulatory takings doctrine, placing particular emphasis on why and how the economic value of land—or rather, the economic burden of a regulation upon a claimant—plays such a significant role in the analysis. Part II examines the foundations and development of regulatory takings analysis as exhibited in a series of Supreme Court decisions, and Part III discusses the ways in which courts analyze the economic burdens of government regulation when presented with a regulatory takings claim. Part IV examines whether the conservation easements fit within this foundation. This Note finds that the degree to which conservation easements may affect the regulatory takings analysis will be determined largely by the amount of funding and policy decisions of the government entities and conservation land trusts that purchase conservation easements. Finally, the Note concludes by explaining several benefits that

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[15] *See infra* Part II.C.3.

[16] *Lingle*, 544 U.S. at 539 (emphasis added).

[17] *Id.* (emphasis added).

[18] *See infra* Part II.C.3.

may arise from the adoption of a public policy that supported this role for conservation easements in the greater scheme of environmental protection.

II. HISTORY OF REGULATORY TAKINGS

This Section begins with a review of eminent domain power and the restraints upon that power that are provided in the Fifth Amendment's Takings Clause. The Section then reviews the early interpretation and implementation of the Takings Clause, leading up to the recognition of the first regulatory taking in the Supreme Court's decision in *Mahon*. The final part of this Section examines the confusion, difficulties and trends that developed in the Supreme Court's regulatory takings analysis following the *Mahon* decision, concluding with an examination of the Court's 2005 decision, *Lingle v. Chevron*, which refocused the regulatory takings analysis.

A. *The Power of Eminent Domain and the Constitutional Restraint Thereof*

Federal, state, and local governments have considerable latitude in regulating private property.[19] Nearly every sovereign entity commands a "police power," pursuant to which a legislature may promulgate regulations, not only to protect public health and safety, but also to promote general welfare, prosperity, and convenience.[20] The power of eminent domain is just one aspect of the sovereign police power, and it consists of the authority to condemn or expropriate private property for public use.[21] Generally speaking, eminent domain represents the pinnacle of a government's regulatory power over otherwise lawful private property use.

The United States Constitution, however, limits the power of eminent domain. The Fifth Amendment, in what is variously referred to as the Eminent Domain Clause, the Just Compensation Clause, as well as the Takings Clause, states, "nor shall private property be taken for public use, without just compensation."[22] The purpose of the Takings Clause is not to prohibit the government from taking private property,[23] but instead to prevent the government "from forcing some people alone to bear public

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[19] Hodel v. Irving, 481 U.S. 704, 713 (1987).

[20] Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906).

[21] Western Union Telegraph Co. of Ill. v. Louisville & N.R. Co., 110 N.E. 583, 589 (1915); Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 57-58 (1913).

[22] U.S. CONST. amend. V.

[23] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

burdens which, in all fairness and justice, should be borne by the public as a whole."[24] Thus, the Constitution only prohibits the governmental appropriation of private property when it is for a purpose other than "public use"[25] and requires that "just compensation" be paid to the owner whenever private property has lawfully been "taken."[26] This Note does not focus on questions of what constitutes a "public use" or "just compensation." Instead, this Note focuses upon whether a "taking" has occurred.

B. Pennsylvania Coal Co. v. Mahon: *Recognition of Regulatory Takings*

The Takings Clause was initially understood to have limited legal implications.[27] For over 130 years, most people thought the Takings Clause applied only to a "direct appropriation" of private property,[28] or the "functional equivalent of a practical ouster of [the owner's] possession."[29]

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[24] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[25] Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

[26] United States v. Miller, 317 U.S. 369, 373 (1943) (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893), and Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304(1923)) ("[Just compensation] means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.").

[27] In early United States history, the Takings Clause applied only to actions of the federal government. *See, e.g.*, Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250–51 (1833) (rejecting a takings claim leveled against the City of Baltimore because the Fifth Amendment only applied to the federal government). It was not until 1897 that the Supreme Court held that the Takings Clause of the Fifth Amendment was made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See* Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994) (citing Chicago, Burlington & Quincy Ry. v. City of Chicago, 166 U.S. 226, 241 (1897)).

[28] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Legal Tender Cases, 12 Wall. 457, 551 (1871)).

[29] *Id.* at 1014 (internal quotation marks omitted) (alteration in original) (quoting Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879)). It should be noted that scholars continue to argue over whether the Takings Clause was originally understood to include regulatory takings. *Compare* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798 (1995) ("The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state Takings Clauses all indicate that compensation was mandated only when the government physically took property."), *and* Mathew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053,

Examples of "direct appropriations" include the Government's physical occupation of private property or seizure of a business operation.[30] A "practical ouster" occurs when, for example, a Government action results in permanent flooding of private property.[31]

Therefore, Government regulations absent such physical appropriations were not originally considered "takings" that required just compensation, even when such regulations restricted or eliminated an owner's right to use private property and thereby caused the owner direct and significant harm.[32] The perceived unfairness of this limited application was, understandably, the source of much controversy.[33] In 1922, the Supreme Court addressed these concerns and determined that a regulation, despite falling short of physical appropriation, may nonetheless go so far as to amount to a taking requiring just compensation.[34]

2055 (2004) ("[T]he original understanding of the clause was that compensation for property affected by government action was due only when the government physically took the property in question."), *with* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 182 (1999) ("Contrary to most recent scholarship, the text and historical record of the Takings Clause arguably support a just compensation requirement for regulatory takings.").

[30] *Lingle*, 544 U.S. at 537. *See also* United States v. General Motors Corp., 323 U.S. 373, 375–78 (1945) (Government's occupation of a private warehouse effected a taking); United States v. Pewee Coal Co., 341 U.S. 114, 115–16 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking).

[31] Gibson v. United States, 166 U.S. 269, 276 (citing Pumpelly v. Green Bay Co., 13 Wall. 166 (1871)).

[32] *See, e.g.*, O'Connor v. Pittsburgh, 18 Pa. 187, 190 (1851) (holding that, despite the seeming injustice, the Pennsylvania Constitution's just compensation clause only applied to private property actually taken and not to property that is merely injured or even destroyed).

[33] For example, in 1857 Theodore Sedgwick reviewed a number of state cases that denied compensation under the Takings Clause in the absence of an actual appropriation of private property. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519 (1857) ("It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious . . ."). Sedgwick further stated: "I cannot refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of property . . . seems to me, far too narrow a construction to answer the purposes of justice." *Id.* at 524.

[34] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

Pennsylvania Coal Co. v. Mahon concerned the economic impact of a Pennsylvania statute upon a coal company's mining rights.[35] Justice Holmes delivered the opinion of the Court and found that meaningful enforcement of the Takings Clause requires protection from extensive land use restrictions.[36] Holmes recognized that regulation under the police power that prohibits the economic use of property "has very nearly the same practical effect for constitutional purposes as appropriating or destroying it."[37] It follows that, in order to provide any practical protection of private property, the Takings Clause must apply to regulations that diminish the value of the affected property.[38] Thus, Holmes famously concluded that, "while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking."[39]

Unfortunately, *Mahon* offered little guidance regarding when and under what circumstances a given regulation goes "too far" for purposes of the Takings Clause.[40] Holmes did say that "[o]ne fact for consideration in determining such limits is the extent of the diminution."[41] But the "extent"

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[35] *Id.* at 412. The Coal Company executed a deed that conveyed the surface of a parcel of land but expressly reserved the right to remove all coal underneath it. *Id.* Forty years after the transfer, the Pennsylvania legislature passed a statute called the Kohler Act, which prohibited mining of coal in such a way as to cause instability to any human habitation. *Id.* at 412–13. Mahon, meanwhile, had obtained the aforementioned surface rights and built a house upon the land. *Id.* at 412. Pursuant to the Kohler Act, Mahon sought an injunction to prevent the Coal Company from mining the coal under the house he had built. *Id.* The Coal Company argued that, if not allowed to mine the coal underneath the house, the Kohler Act was, in effect, a taking by the Pennsylvania legislature without just compensation. *See id.*

[36] *Id.* at 413–15. Justice Holmes explained that the mining right retained by the Coal Company in the original deed was, in fact, private property and held considerable value in terms of the potential profit it afforded. *Id.*

[37] *Id.* at 414.

[38] *See id.*

[39] *Id.* at 415 (emphasis added).

[40] *Lucas*, 505 U.S. at 1015.

[41] *Mahon*, 260 U.S. at 413. Another factor Holmes considered was the extent of the public interest being asserted by the statute, which was balanced against the extent of diminution suffered by the owner of the affected property in what resembled a substantive due process analysis. *See infra* Part II.C.1. Holmes found that the public interest at issue was limited because the statute was interfering with "ordinary private affairs," was not remedying a "public nuisance," and was not "justified as a protection of personal safety." *Mahon*, 260 U.S. at 413-14. On the other hand, Holmes found that the Coal Company's mining right was recognized as an estate in land under Pennsylvania law, and furthermore, was extremely valuable. *Id.* at 414. Thus, Holmes concluded that the asserted public interest did not warrant the diminution suffered by the Coal Company. *Id.*

deserving just compensation was defined no further than "a certain magnitude."[42] Thus, despite endorsing consideration of a regulation's economic impact, Holmes's opinion contains nothing resembling a concrete test for the identification of regulatory takings. Instead, Holmes said that "the question depends upon the particular facts" of the case.[43] The Supreme Court has repeatedly echoed this sentiment, admitting failure to develop any "set formula" for determining how far is too far, and preferring instead to engage in what are "essentially ad hoc, factual inquiries."[44]

C. *Moving Towards a Cohesive Regulatory Takings Analytical Framework*

This Section traces the history of the Supreme Court's regulatory takings jurisprudence following *Mahon*. This Section focuses upon the inherent problem with regulatory takings analysis—the difficulty of determining when a regulation has gone "too far" for purposes of the Takings Clause. While this Section examines the differing approaches the Supreme Court has taken when answering this question, it concludes that the Court's *Lingle* decision has significantly refocused the analysis and eliminated much of the confusion in this area of the law. Specifically, this Section will show why *Lingle* will have the effect of refocusing the regulatory takings analysis on the economic impact of governmental action upon the affected parcel. This is an important development for environmental protection because most environmental regulations impose development restrictions and therefore frustrate the economic value of affected parcels, which is why this Note examines a potential argument supporting the economic value of conserved land.

1. *Confusion: The Legacy of* Mahon

As explained in the preceding section, *Mahon* left the Supreme Court with a very difficult question—when does a regulation go "too far" for purposes of the Takings Clause—and very little analytical guidance to develop an answer. For over fifty years following *Mahon*, the regulatory

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[42] *Mahon*, 260 U.S. at 413.

[43] *Id.*

[44] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)); *Lucas*, 505 U.S. at 1015 (quoting *Penn Cent.*, 438 U.S. at 124); *Lingle*, 544 U.S. at 538 (quoting *Penn Cent.*, 438 U.S. at 124).

takings issue was not addressed in a meaningful manner by the Court.[45] But, beginning in the 1970s, and in the thirty years since, the Court has regularly taken the opportunity to establish or identify an analytical framework for determining when a regulation has gone "too far"[46]—though to varying degrees of success.[47] In order to understand the direction in which the Court's takings analysis is moving, and why it has moved in that direction, it is helpful to understand the challenges the Court has faced in the years following *Mahon*.

Problems with the doctrine are traced back to when the Supreme Court first applied the Takings Clause to the states in *Chicago, Burlington & Quincy R.R. Co.*[48] The Court applied the Takings Clause to a state action because it held that just compensation was a due process right under the Fourteenth Amendment.[49] The resulting rationale amounted to a confusing merger of "a due process inquiry into the underlying validity of a state action with a takings inquiry that, in its plain meaning, *places a condition on an otherwise valid state action* due to its impact on private property interests."[50] This merger of the Takings and Due Process doctrines influenced *Mahon*, which was decided under the Due Process Clause as much or more so than it was decided under the Takings Clause.[51]

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[45] Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 463 (2006).

[46] Lewis S. Wiener, *Has the High Court Taken Away Private Property Rights?*, 20 LEGAL BACKGROUNDER 39, Aug. 12, 2005, at 2, *available at* http://www.wlf.org/upload/081205LBWiener.pdf (last visited Nov. 17, 2007) (citing to the Supreme Court's thirty-three takings decisions between 1979 and 2005).

[47] For example, by the early 1980s, the Court was applying at least two different formulations for deciding regulatory takings cases. *See* John A. Humbach, *The Takings Clause and the Separation of Powers: An Essay*, 21 PACE ENVTL. L. REV. 3, 20 (2003) (explaining the difference between the "three-part" test developed in *Penn Central* and the "two-part" test developed in *Agins*).

[48] Jacobs, *supra* note 45, at 458.

[49] *Id.* at 458–59.

[50] *Id.* at 458 (emphasis in original). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (noting that the Court, in the years leading up to and including *Mahon*, "fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into a single standard").

[51] Humbach, *supra* note 47, at 18 ("*Pennsylvania Coal* was not actually *decided* under the takings clause but under the due process clause."); Jacobs, *supra* note 45, at 460 (noting that the remedy provided in Mahon—striking down the law rather than awarding just compensation—is evidence of the Court's intermingling of the Due Process and Takings Clauses).

Further complicating the matter was the fact that *Mahon* was decided at the height of *Lochner*-era economic due process, whereby the Supreme Court reviewed economic regulations, such as land use laws, under its perceived role as a kind of "super-legislature."[52] The Court's decision in *Mahon* was essentially an economic due process case in which the Kohler Act was determined to have failed all three elements of the *Lawton v. Steele* test.[53] The Court abandoned the economic due process doctrine in 1938 when it announced the "rational basis" test, under which far more deference was given to an elected legislature's economic decisions.[54] Perhaps because the "regulatory taking" issue was born during the *Lochner* era, and was not addressed in the post-New Deal era during which other *Lochner*-era rationale was dismissed, it is not surprising that economic due process somewhat confused the Court's regulatory takings analysis following the issue's revival in the 1970–80s.[55]

2. *Resurrecting and Rectifying the Regulatory Takings Analysis*

The Burger Court's opinion in *Penn Central Transportation Co. v. New York City* marked the first meaningful assessment of the regulatory takings doctrine since it was established by *Mahon* in 1922.[56] In *Penn Central*, the Court was asked whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal

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[52] Jacobs, *supra* note 45, at 459, 461. The basic ideology of economic due process was that the constitutional structure of government provided for judicial supervision of economic legislation. *See also* Humbach, *supra* note 47, at 23 (explaining that the economic due process doctrine gave the courts the "power to second-guess elected legislatures on the 'wisdom' of economic legislation").

[53] Humbach, *supra* note 47, at 18. Under the *Lawton v. Steele* economic substantive due process test, a court would invalidate economic legislation if it failed to meet the following factors: (1) the interests of the public generally must require the commercial interference; (2) the means must be reasonably necessary to accomplish the public purpose; and (3) the means must be not unduly oppressive upon individuals. Lawton v. Steele, 152 U.S. 133, 137 (1894). Humbach argues that the rationale in the *Mahon* opinion mirrors the factors set out in *Lawton v. Steele*. Humbach, *supra* note 47, at 18. Especially significant is the fact that the opinion concludes: "[W]e should think it clear that the statute does not disclose a *public interest sufficient to warrant* so extensive a destruction of the defendant's constitutionally protected rights." *Mahon*, 260 U.S. at 414 (emphasis added).

[54] *See* United States v. Carolene Products Co., 304 U.S. 144, 153 (1938). *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

[55] Jacobs, *supra* note 45, at 461–62; Humbach, *supra* note 47, at 22–23.

[56] Jacobs, *supra* note 45, at 463.

was a taking without just compensation for purposes of the Takings Clause.[57] The law, as applied, prevented plaintiff, Penn Central, from constructing a 55-story office tower on top of the terminal and thus, it was argued, significantly undermined the economic value of that parcel of land.[58]

Generally speaking, the Court rejected Penn Central's challenge by applying a three-factor test that was derived from an assortment of previous decisions.[59] The Court considered: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[60] With regard to the third and final factor, the Court declared that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[61] This three-factor test has since become the dominant method of regulatory takings analysis.[62]

But in the same opinion, Justice Brennan in dicta heralded the development of a wholly separate analysis for regulatory takings that became known as the "substantially advance" test.[63] The Court formalized the "substantially advance" test in *Agins v. City of Tiburon*, in which it held that the application of a local land use law to a particular parcel of property effects a taking if the ordinance does not "substantially advance legitimate state interests *or* denies an owner economically viable use of his land," and furthermore, that the question "necessarily requires a weighing of private and public interests."[64] Thus, *Agins* added a second, non-economic prong to the takings analysis—a prong which very much resembled the economic substantive due process analysis of the *Lochner*-era Court.[65] In the years

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[57] *Penn Cent.*, 438 U.S. at 107.

[58] *Id.* at 116–17.

[59] Jacobs, *supra* note 45, at 463.

[60] *Penn Cent.*, 438 U.S. at 124.

[61] *Id.*

[62] Jacobs, *supra* note 45, at 463.

[63] *Id.* Specifically, Justice Brennan noted "that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Cent.*, 438 U.S. at 127. Justice Brennan cited a *Lochner*-era economic substantive due process case in support of this proposition. *Id.* (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)); *see also* Jacobs, *supra* note 45, at 460–61. The *Nectow* opinion is also cited in *Agins*. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[64] *Agins*, 447 U.S. at 260–61 (citations omitted) (emphasis added).

[65] *See* Jacobs, *supra* note 45, at 463.

following *Agins*, the Court repeatedly conflated the *Penn Central* economic impact analysis with the *Agins* "substantially advance" test.[66]

In 2005, however, the Court's decision in *Lingle v. Chevron* repudiated the *Agins* "substantially advance" test and in so doing, made great strides in establishing a cohesive regulatory takings analytical framework. Justice O'Connor wrote the opinion for the Court and denounced the "substantially advance" test because it would allow the "courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[67] In other words, the Court expressly set out to divorce the due process analysis from the takings analysis.[68]

3. *Going Forward: "Functionally Equivalent" Analysis*

The "substantially advance" test was, in general, a "little-used and poorly understood theory," which may lead one to assume that *Lingle* was in fact a narrow decision of little consequence.[69] But upon closer examination, it becomes clear that the Court expressed a greater understanding of the regulatory takings analysis in *Lingle* than it had exhibited in any previous decision.[70] Justice O'Connor announced that the main goal of the Court's takings analysis is to "identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[71] In order to calculate such equivalence, O'Connor continued, the Court's analysis must "focus[] directly upon the *severity of the burden* that government imposes upon private property rights."[72]

Proponents of environmental regulations must respond to the functional equivalence notion of takings by developing arguments that support the remaining economic value of the land affected by such regulations. Justice O'Connor's attempt to directly focus the regulatory takings inquiry upon the severity of the regulatory burden echoes Justice Holmes's original edict: "if

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[66] *Id.* at 465.

[67] Lingle, 544 U.S. at 544 (2005).

[68] *See id.* at 542–44.

[69] Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 371–72 (2006).

[70] *Id.* at 398, 401.

[71] *Lingle*, 544 U.S. at 539 (emphasis added).

[72] *Id.* (emphasis added). The "substantially advance" test has no place under this understanding of the takings analysis because, as Justice O'Connor pointed out, it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights," nor about "how any regulatory burden is *distributed* among property owners." *Id.* at 542 (emphasis in original).

regulation goes *too far* it will be recognized as a taking."[73] Refocusing regulatory takings analysis upon the severity of the regulatory burden eliminates from the purview of the courts many of the tangential issues surrounding land use regulations. As a result, environmental regulations will be evaluated primarily upon the degree of economic impact they have upon a claimant.

Some commentators have speculated upon whether the functional equivalence notion has altered the takings standard so as to require a greater economic burden. Robert Dreher, Professor of Natural Resources Law at George Washington University Law School, argues that *Lingle* has set the takings standard higher—requiring a burden that would approach if not equal the total loss that physical expropriation would inflict.[74] The higher standard, he argues, will not only reduce the number of takings claims, but embolden government regulation by limiting the risk of financial exposure to takings liability.[75] While it remains to be seen whether *Lingle* will move the standard in one direction or the other, scholars are likely to find out because, contrary to Professor Dreher's assumptions, an emboldened government will likely increase the number of takings claims going forward.[76]

Increasing environmental concern amongst the American public combined with a Democrat resurgence in state and federal government likely means reinvigorated environmental regulation and, subsequently, diminution of property value to a greater extent and to a greater amount of land. The increasing public concern for environmental issues, however, is unlikely to offset the litigious response that most citizens have when environmental regulations reduce the economic value of their property.[77] So while *Lingle* is certainly a "win" for the government,[78] One should not assume that private

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[73] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added).

[74] Dreher, *supra* note 69, at 402. *See also* Andrew W. Schwartz, *How the Government Can Avoid Property Rights Litigation*, SM040 ALI-ABA 497, 504–06 (2007) (noting that "[in *Lingle*] the Court returned to the original, limited formulation of regulatory takings, limiting compensable regulation to those that are the functional equivalent of eminent domain"); Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 582 (2007) (speculating that the courts might "ratchet[] up the 'economic impact' prong of *Penn Central*" in response to *Lingle*).

[75] Dreher, *supra* note 69, at 402–03.

[76] *See* Jacobs, *supra* note 12, at 65.

[77] *See, e.g.*, Charles R. Wise, *Property Rights and Regulatory Takings*, *in* ENVIRONMENTAL GOVERNANCE RECONSIDERED 289–91 (Robert F. Durant, Daniel J. Fiorino & Rosemary O'Leary eds., 2004) (describing the "visible, conflictual, and litigious" response to environmental regulations over the past quarter century).

[78] Dreher, *supra* note 69, at 401 ("[T]here is no doubt who won and who lost in *Lingle*.").

property owners will suddenly throw down the proverbial sword and accept economic losses in the name of environmental stewardship. Built upon this conviction, this Note examines the ways in which the courts determine whether the severity of a regulatory burden amounts to the functional equivalent of a direct appropriation,[79] and then examines whether conservation easements may have an impact on the analysis.[80]

III. EXAMINING HOW COURTS ANALYZE THE ECONOMIC BURDENS OF GOVERNMENT REGULATION

As explained above, *Lingle v. Chevron* represents an important change in the Court's approach to the regulatory takings issue.[81] First, the Court eliminated one of the two formulations that it had been using in regulatory takings cases.[82] Second, and more importantly, the Court sought to establish a cohesive approach to all regulatory takings by characterizing the goal of courts hearing such claims as an effort "to identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[83] In order to determine whether a regulatory action is functionally equivalent to a direct appropriation, the courts must examine the "severity of the burden that [the] government imposes upon private property rights."[84] The way in which the courts have and will analyze the severity of the regulatory burden is the subject of this Section.

Environmental regulations affecting private land use will generally be analyzed under two standards.[85] The first, which this Note will refer to as the

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[79] *See infra* Part III.

[80] *See infra* Part IV.

[81] Jacobs, *supra* note 45, at 473–75.

[82] Jacobs, *supra* note 45, at 451–52 ("The Court, in *Lingle*, took the well-accepted precedent that a law violates regulatory takings doctrine if it fails to 'substantially advance' the government's asserted interest in passing the law [per the *Agins* two-part test], and decided it was inimical to a modern understanding of the Fifth Amendment's Takings Clause.").

[83] Lingle v. Chevron, 544 U.S. at 539 (2005) (emphasis added).

[84] *Id.*

[85] The Supreme Court has actually developed no less than four modes of analyzing regulatory takings claims—only two of which are discussed in this Note. *See* John C. Keene, *When Does a Regulation "Go Too Far?"—The Supreme Court's Analytical Framework for Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain*, 14 PENN ST. ENVTL. L. REV. 397, 419–21 (2006). One that this Note will not discuss applies when a regulation forces an owner to suffer a permanent physical invasion of his property. *See Lingle*, 544 U.S. at 538 (citing

Lucas test,[86] is a categorical rule, whereby a regulation that completely deprives an owner of "*all* economically beneficial us[e] of her property" is deemed a per se taking.[87] If, on the other hand, it is determined that some economically beneficial use remains, then the court will analyze the severity of the burden under the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[88] The *Penn Central* test, as this Note will refer to it, balances three factors: (1) the "economic impact" of the government action; (2) the extent to which the action "interferes with distinct investment-backed expectations"; and (3) the "character" of the action.[89] The goal of this Section is to establish a framework with which to analyze—in Part IV—the potential impact of conservation easements upon the determination of regulatory burdens.

A. Lucas *Test: Deprivation of All Economically Beneficial Use*

In *Lucas v. South Carolina Coastal Council*, the Supreme Court established a categorical rule by which any regulation that deprives an owner of all economically beneficial use of his or her property is a per se taking.[90] Above all, it is important to understand that *Lucas* established a very narrow rule.[91] Justice Scalia, who authored the *Lucas* opinion, said himself that the rule would only apply in "relatively rare situations."[92] And in *Lingle*, Justice O'Connor reiterated that sentiment by explaining that the *Lucas* test applied

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Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419–20 (1982)). The presence of a permanent physical invasion amounts to a categorical, or per se, regulatory taking. *Id.* The second mode of analysis this Note will not discuss applies when the government imposes an exaction—in the form of an interest in real property, money or services—as a condition for the grant of a development permit. Lauren Reznick, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 727 (2007). *Lingle* cast a shadow of uncertainty over this area of the law. *See id.* at 727–29 (discussing whether *Lingle* will force the Court to reconsider the standard that applies to development exactions).

[86] This categorical rule was formally established by the Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

[87] *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019).

[88] *Lingle*, 544 U.S. at 538.

[89] *Penn Cent.*, 438 U.S. at 124.

[90] *Lucas*, 505 U.S. at 1019.

[91] John D. Echeverria, *The Death of Regulatory Takings*, 34 ECOLOGY L.Q. 291, 293 (2007) ("[A]fter *Tahoe-Sierra* the *Lucas* rule might not even properly apply to the *Lucas* case itself and is, regardless, virtually meaninglessness in practice."); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 353 (2007) (discussing "the exceedingly narrow scope of *Lucas's* total taking rule").

[92] *Lucas*, 505 U.S. at 1018.

to a "relatively narrow" set of claims that involve "the complete elimination of a property's value."[93] That being said, environmental regulations often place absolute restrictions on the developmental use of an owner's entire parcel of property and in these situations plaintiffs can argue that such restrictions cause a *Lucas* taking.[94]

The Court has repeatedly said that "the issue [of] whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question."[95] Generally, the predominant fact to be considered is value—and specifically whether the land has been deprived of all its value.[96] But two issues central to a determination of value are (1) does value mean economically beneficial use or merely land value, and (2) how much value must remain to avoid deprivation of all value?[97] These issues are examined in turn below.

1. *Economic Use or Land Value?*

In *Lucas*, Justice Scalia used the terms "use" and "value" interchangeably,[98] suggesting ambiguity as to whether a total loss of *both* economic use and land value must be shown in order to trigger the categorical rule.[99] A possible explanation for this ambiguity is that the Court was bound by the trial court's finding that the regulation deprived the plaintiff of any reasonable economic use of his property and, as a direct result thereof, destroyed all value in that property.[100] Thus, the *Lucas* Court

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[93] *Lingle*, 544 U.S. at 538–39.

[94] Meltz, *supra* note 91, at 331. Meltz also explains that the existence of claims made under the *Lucas* argument is a result of the fact that a plaintiff is more likely to win if the court analyzes under the *Lucas* test than if the court analyzes the plaintiff's claim under the more deferential *Penn Central* balancing test. *Id.* at 330–31.

[95] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).

[96] *Lingle*, 544 U.S. at 539.

[97] Meltz, *supra* note 91, 331–32.

[98] *Compare Lucas*, 505 U.S. at 1007 ("This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property . . ."), *with Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

[99] *See* Meltz, *supra* note 91, at 331.

[100] *Lucas*, 505 U.S. at 1009 ("[T]his prohibition deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless.") (citation omitted) (internal quotation marks omitted).

itself did not endeavor upon an economic analysis of the regulatory impact upon Lucas's land.[101]

As a result, plaintiffs have argued that development restrictions effect a *Lucas* taking even when significant land value remained.[102] Most courts analyze takings claims under the *Lucas* test in terms of the "economic," "beneficial," or "productive" use remaining—and not in terms of the remaining land value.[103] This is in spite of the fact that the Supreme Court has emphasized in recent years the importance of determining whether a *total loss of value* has occurred when applying the *Lucas* test.[104] Perhaps the confusion over this issue is best exemplified by a Federal Circuit decision, which held that the owner of land subject to current development restrictions may nonetheless enjoy economic use of that land by selling it to speculators willing to gamble that the restrictions will be lifted someday.[105] Thus, that court found, on the one hand, that land is valueless without developmental or economic land use rights, but on the other hand, the possibility of future developmental use will always generate current or immediate economic use due to the uncertain nature of land use legislation.[106]

In regards to the examination of environmental regulations, a court will be less likely to find a taking if land value is the focus of the analysis.[107] A parcel of property will almost always retain some value, even if that value is speculative in nature. Economic, beneficial and productive ideas of use, on the other hand, are closely tied with development and profit—both of which are inimical to most environmental regulations. Since most courts examine

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[101] *Id.* at 1020 n.9 (noting that the trial court's finding that Lucas's land was rendered valueless was not challenged and therefore not considered by the Court in rendering its opinion).

[102] Meltz, *supra* note 91, at 331.

[103] *Id.*

[104] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) ("[T]he categorical rule would not apply if the diminution in value were 95% instead of 100% . . . [a]nything less than a complete elimination of value, or a total loss . . . would require the kind of analysis applied in *Penn Central*.") (citations omitted) (internal quotation marks omitted); *Lingle*, 544 U.S. at 539 ("In the Lucas context, of course, the complete elimination of a property's value is the determinative factor.").

[105] Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 902–03 (Fed. Cir. 1986) ("We do not perceive any legal reason why a well-informed 'willing buyer' might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted.").

[106] *See id.*

[107] *See, e.g.*, *supra* notes 105–06 and accompanying text.

Lucas claims in terms of the regulatory impact upon economic use,[108] defenders of environmental regulations must be prepared to argue that economic use can be made of undeveloped land. Because *Lucas* is such a narrow rule, most claims made under it will fail. However, analysis of economic impact is also a central element of the *Penn Central* test, which is why this Note examines potential arguments for the economic use of undeveloped land in Part IV.

2. *How much value is "no value"?*

The Supreme Court has said that *Lucas* is a narrow rule, applying only to situations in which a parcel of land is left with no value.[109] But because one could argue that a parcel of land will always retain *some* value subsequent to regulation,[110] the question remains as to how much the land's value must be diminished in order to amount to a *Lucas* taking.[111] The Supreme Court, in *Palazzolo v. Rhode Island*, said that a "[s]tate may not evade the duty to compensate on the premise that the landowner is left with a token interest."[112] But the Court found that the $200,000 remaining from the $3,150,000 pre-regulation value of the property was more than a "token interest" despite being a ninety-four percent diminution in value.[113] Thus, *Palazzolo* proved that Justice Scalia's suggestion in *Lucas* that a ninety-five percent diminution in value would not fall under the categorical rule was not made *arguendo*.[114]

In addition to its "token interest" language, the Court has also examined whether a regulation has left the property "economically idle."[115] For example, the plaintiff in *Palazzolo* purchased his property with the expectation of developing a 74-lot residential subdivision.[116] Despite the fact that the plaintiff's expectations were completely quashed with respect to his development plans, the Court nonetheless determined that the regulation did not leave the property "economically idle" because it permitted the plaintiff

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[108] Meltz, *supra* note 91, at 331.

[109] *Tahoe-Sierra*, 535 U.S. at 330.

[110] *See, e.g.*, *supra* notes 105–06 and accompanying text.

[111] Meltz, *supra* note 91, 331–32.

[112] Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

[113] *Id.* at 606, 631.

[114] *Lucas*, 505 U.S. at 1019 n.8. Furthermore, Justice Scalia described the total taking situation as "extraordinary" and "relatively rare." *Id.* at 1017–18.

[115] *Palazzolo*, 533 U.S. at 631 (quoting *Lucas*, 505 U.S. at 1019).

[116] *Id.* at 606.

to build a single residence.[117] The *Palazollo* decision not only suggests that the *Lucas* test requires total elimination of the use or value of a claimant's entire parcel, it also suggests that "use" may not be so closely associated with "profit" within the meaning of the test.

These factors play a crucial role in the analysis in Part IV—whereas the proof of any income that can be derived from owning totally undeveloped land may prevent a claimant from finding success under the *Lucas* test. In fact, because the standard is so high, fee owners of land rarely succeed in bringing claims under *Lucas*—even when development rights are totally restricted.[118] As a result, most takings claims are examined under the *Penn Central* test.

B. Penn Central *Balancing Test for Partial Regulatory Takings*

Academics have criticized the Court's "vague ad hocery" in approaching the "famously muddy language of the *Penn Central* decision."[119] The Supreme Court itself has admitted to the troubles associated with an analysis under the *Penn Central* guidelines.[120] Nonetheless, the test remains the

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[117] *Id.* at 631.

[118] Meltz, *supra* note 91, at 332. Meltz notes that "[e]ven a parcel on which one cannot build at all likely retains value as private open space for a neighbor, or for speculation that the restriction someday will be lifted," and concludes that *Lucas* would be more applicable to less-than-fee interests in land because the value of such interests is more likely to be totally eliminated. *Id.*

[119] Michael M. Berger, Tahoe-Sierra*: Much Ado About-What?*, 25 U. HAW. L. REV. 295, 311–12 (2003); John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ENVTL. L. REP. 11,235, at 11,235 (2002), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Law_ELR TahoeSierra.pdf (last visited Nov. 17, 2008); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 679-80 (2005); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 309 (1998). Perhaps the biggest problem with the *Penn Central* analysis is that the economic assessment it promotes conflicts with the legal principles it applies. *See* William W. Wade, Penn Central*'s Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 278–79 (1999). For example, the "whole parcel rule" starkly contradicts incremental economic theory. *Id.* at 278. (explaining that incremental economic theory provides "that economic activity is best analyzed in terms of incremental units, elements, and decisions").

[120] *Tahoe-Sierra*, 535 U.S. at 322 n.17 ("When . . . the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex."); *Lingle*, 544 U.S. at 539 ("The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the

primary mode of regulatory takings analysis.[121] The *Penn Central* "test" is actually just an analytical framework whereby a court examines a takings claim along three guidelines: (1) the "economic impact" of the government action; (2) the extent to which the action "interfere[s] with distinct investment-backed expectations"; and (3) the "character" of the action.[122] Amidst the "considerable uncertainty" endemic to regulatory takings law since its genesis in *Mahon*,[123] courts cling to this framework when answering the fundamental question: When has a regulation gone "too far" for purposes of the Takings Clause?

Lingle focused the regulatory takings analysis directly upon the economic prongs of the *Penn Central* test. Justice O'Connor declared that the *Penn Central* test "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[124] But, as Professor Dale Whitman points out, "if *Lingle* is taken seriously, it appears to destroy the 'character of the governmental action' prong of the *Penn Central* takings test."[125] If Whitman is correct and *Lingle* is taken seriously,[126] the result will be a greater focus upon the economic prongs of the *Penn Central* test, which

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principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.").

[121] *See Lingle*, 544 U.S. at 538.

[122] *Penn Cent.*, 438 U.S. at 124.

[123] John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 174–75 (2005) ("To date, the ad hoc *Penn Central* analysis has appeared to mask, if not intellectual bankruptcy . . . at least considerable uncertainty about the fundamental parameters of takings law."). *See also infra* Part II.B (explaining the uncertainty associated with the analysis in *Mahon*).

[124] *Lingle*, 544 U.S. at 540.

[125] Whitman, *supra* note 74, at 574. Whitman's conclusions are based upon the fact that none of today's legitimate interpretations of the "character" prong "focus on the regulation's impact on the owner, which is precisely the only focus that a proper takings analysis can have, according to *Lingle*." *Id.* at 581.

[126] There are some indications that the lower courts will interpret *Lingle* as destroying the "character" prong of the *Penn Central* test. *See, e.g.*, Rose Acre Farms, Inc. v. United States, 2007 WL 5177409 at *8 (noting that the Federal Circuit's analysis under the "character" prong seems to have been voided by *Lingle*). *But see* ConocoPhillips Co. v. Henry, 520 F.Supp.2d 1282, 1312–16 (N.D. Okla. 2007) (extensively analyzing the regulation at issue under the "character" prong of the Penn Central test and concluding it weighed strongly in favor of the claimants). However, despite "significant concerns about the character of the governmental intrusion," the *Henry* court determined that, in light of *Lingle*, "economic loss seems to be a requirement of a *Penn Central* taking rather than merely one factor in the analysis" and therefore concluded that "the 'character of the governmental intrusion' prong can [not] overcome the absence of economic harm." *Id.* at 1316–17.

further emphasizes why it is important for defenders of environmental regulations to develop arguments in support of the economic value of undeveloped land.

This Note presents a simplified analysis of the ways in which the courts determine the economic burden imposed by a regulation upon a takings claimant. Analyzing the regulatory burden of land use regulations is difficult and this section is not intended to be an exhaustive explanation of that process.[127] Instead, this section is designed to provide a framework for analyzing the potential impact of conservation easements on the regulatory burden of land use regulations.[128] To that end, this section will address just three issues: (1) whether the regulatory burden is to be measured in terms of remaining economic use or remaining market value; (2) the methods of calculating value loss; and (3) the degree of loss required to effect a taking. For the sake of brevity, the discussion of these issues combines elements of both the "economic impact" and "investment-backed expectations" prongs of the *Penn Central* test, and thus does not analyze them separately.[129]

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[127] Echeverria, *supra* note 123, at 179 n.34 ("'[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways.'" (quoting *Tahoe-Sierra*, 535 U.S. at 324)). For example, Echeverria cites the difficulty in determining whether a government action imposes losses upon individual owners or, instead, benefits each as a result of the same restrictions being imposed upon all the property in a certain area. *Id* at 179.

[128] *See infra* Part IV.

[129] While courts do employ the "expectations" prong as a separate analysis, it is best understood to function in conjunction with—or as a subsidiary or precondition of—the "economic impact" inquiry. Generally, the "expectations" inquiry cuts against regulatory takings claims. For example, courts are reluctant to accept a takings claim when the property owner had notice of a pre-existing restriction. Echeverria, *supra* note 123, at 183–84. This is the case despite the fact that the Supreme Court, in *Palazzolo*, 535 U.S. 606 (2001), rejected a rule whereby notice absolutely barred a subsequent takings claim. Echeverria, *supra* note 123, at 183 (noting that "*Palazzolo* has had remarkably little impact" because "[t]akings claims brought by purchasers with notice continue to be rejected on a fairly routine basis"). *See also* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001) (recognizing that notice may not serve as an absolute bar, but still plays a large role in assessing takings claims). Other courts discount takings claims if the regulatory burden was reasonably foreseeable. For example, courts ask: "(1) whether the plaintiff operated in a 'highly regulated industry;'" (2) whether the plaintiff, when purchasing the property, was aware of the problem that gave rise to the regulation; "and (3) whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase." Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001)). If the answer to these questions is "yes," then the "expectations" inquiry may have the effect of undermining regulatory takings claim that might otherwise allege sufficient value loss to warrant just compensation. *See id.* In the sections below, this Note will

1. *Economic Use or Market Value: The Standard of Measurement*

Because the *Penn Central* opinion did not declare whether economic impact was intended to be measured in terms of remaining economic use or remaining market value, courts have applied both standards of measurement when analyzing regulatory takings claims. Many state courts focus on economic use[130] while the Court of Federal Claims and the Federal Circuit tend to focus upon market value.[131] The next Section (III.B.2.) examines the methods of calculating remaining market value. This Section addresses the meaning of "economic use," which is important because most courts find that development restrictions totally frustrate economic use[132] and most environmental regulations place restrictions on development. In other words, strictly conserved land is generally thought to have no economic use. If conservation easements are to have a meaningful impact upon the regulatory takings analysis, they must be able to fit within the courts' understanding of economic use.

The meaning of an economically viable "economic use" is not restricted to uses that return a profit, such as logging or condominium development.[133] Land use is "economically viable" when "a sufficient number of people would be willing to buy the property for that use, whatever it might be, to make the property 'commercially marketable.'"[134] Proving the viability of the remaining economic use is a separate hurdle for the government—in order to allege that remaining uses offset the losses imposed by the land use restrictions, the government must first prove that the alleged remaining uses are viable.[135] One standard that courts apply when determining whether an economic use remains viable consists of two requirements: the government must show a "reasonable probability that the land is both [1] physically

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analyze the ways in which the "expectations" inquiry affects the "economic impact" inquiry more directly.

[130] Meltz, *supra* note 91, at 334 (citing Coast Range Conifers, LLC v. State, 117 P.3d 990 (Or. 2005)).

[131] *Id.* (citing Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994)).

[132] *See, e.g.*, Coast Range Conifers, LLC v. State, 117 P.3d 990 (Or. 2005) (decision based upon the assumption that a logging restriction frustrated the economic use of that portion of plaintiff's property to which it applied).

[133] *See* Meltz, *supra* note 91, at 336.

[134] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff'd in part, rev'd in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

[135] *See, e.g., id.*

adaptable for such use and [2] that there is a demand for such use in the reasonably near future."[136]

In proving that the land is physically adaptable for the remaining use, the courts are not to consider the relative economic value of the use.[137] But "physical adaptability" means something more than mere "physical possibility."[138] Rather, there must be a "reasonable possibility" that the landowner could put his tract of land to the alleged remaining use.[139] As a result, "physical adaptability" may not be found if there are unreasonable or unattainable prerequisites for using the land in the alleged manner.[140]

The second requirement is an extension of the first. Just as mere physical possibility cannot establish physical adaptability, physical adaptability cannot establish economic viability unless there is a reasonable probability that there is a need or demand for the alleged remaining use.[141] An alleged remaining use that amounts to mere speculation or conjecture will not be considered a viable economic use.[142] The government must provide evidence showing that the alleged remaining use is feasible and that there would be a demand for that use in the reasonably near future.[143] Often times, tangential factors will inform a court's determination of whether an economic use

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[136] Walcek v. United States, 49 Fed. Cl. 248, 262 (2001) (quoting Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 158 (1990)), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

[137] *See id.* (stating that plaintiff's concerns over the diminished profitability of the remaining use "go not to the viability of the project, but to the value thereof").

[138] Olson v. United States, 292 U.S. 246, 256 (1934) ("The use of shorelands for reservoir purposes . . . shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value.").

[139] *Id.* at 256–257.

[140] *See, e.g.*, *id.* (finding that there was no reasonable possibility for owner to use his property as a reservoir because building it would have required the purchase of several flowage easements that "were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation").

[141] United States v. 341.45 Acres of Land, 633 F.2d 108, 111 (8th Cir. 1980) ("Thus, *Olson* teaches that a proposed 'use' requires a showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a need or demand for such use in the reasonably near future."). *341.45 Acres* applied this rule to a landowner that alleged certain uses in order to increase the amount of just compensation due as a result of a regulation that frustrated the alleged uses. *Id.* But *Walcek v. United States* extended the rule to situations in which the government offers proof of the value in the remaining use of regulated property so as to avoid a successful takings claim. *Walcek*, 49 Fed. Cl. at 262.

[142] *341.45 Acres*, 633 F.2d at 110.

[143] *Id.* at 111. Such a showing may be made by calling witnesses to testify as to feasibility and demand. *Walcek*, 49 Fed. Cl. at 262.

remains for the property at issue, such as factors increasing a property's speculative value.[144]

The most common way of determining whether a demand exists for the alleged remaining use is to examine whether a competitive market exists for purchasing the property despite the restrictions imposed by the regulation at issue.[145] Under this mode of analysis, if "a significant number of people would be willing to buy the property" in spite of the land use restrictions, then that property would be "commercially marketable" and thus have an economic use.[146] This approach may be subsumed under the analysis described in the next section, and thus many courts often skip this inquiry altogether and go straight to determining the loss in market value as a result of the regulation. But when the alleged remaining use is valued in an emerging market this issue is of special importance, because many claimants—and courts—may not even be aware that such markets exist. Thus, before the government can even allege the remaining value in regards to conservation easements, that entity must first prove that deriving value from those sources would be feasible for the claimant.

2. *Methods of Calculating Value Loss: Determining the Regulatory Burden*

There are generally three methods of determining the economic impact of government regulation on a parcel of property.[147] The first method, which this Note refers to as the "comparable sales approach," relies upon a comparison in the fair market value of the property with and without the regulation in order to determine the diminution in value.[148] The second method is similar but compares the regulated market value of the property with the owner's original cost basis instead of the non-regulated value of the

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[144] *See, e.g.*, Fla. Rock Indus. v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986) (in the typically rabid real estate market in South Florida, the ability to sell development-prohibited wetland to speculators willing to gamble that restrictions might someday be lifted was a viable economic use).

[145] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff'd in part, rev'd in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

[146] Meltz, *supra* note 91, at 336.

[147] *See, e.g.*, Cane Tennessee v. United States, 71 Fed. Cl. 432, 440 (2005) (describing appraisal of claimant's property "using three different methods of valuation: (1) the comparable sales approach; (2) the cost approach; and (3) the income capitalization approach").

[148] *See* Echeverria, *supra* note 123, at 180.

property.[149] The third method, which this Note refers to as the "income capitalization approach," analyzes the effect that a regulation has upon the realization of a reasonable return and/or profit on a particular investment.[150] In general, courts may use any method of valuation—or even combine methods—in order to tailor their analyses to the particular circumstances of the alleged taking.[151] This section will only discuss two of these methods: the comparable sales approach and the investment capitalization approach.[152]

a. *Comparable Sales Approach*

The most common approach to determining the economic impact of a governmental regulation on a property is to compare the fair market value of the property before the land use restrictions were imposed with the fair market value afterward.[153] The general understanding of market value is that it represents "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."[154]

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[149] *Id.* at 181.

[150] *Id.* at 182.

[151] *See* Meltz, *supra* note 91, at 336–37 (citing *Cane Tennessee*, 71 Fed. Cl. at 439). This is especially true in the Federal Circuit:

> The Federal Circuit . . . has made clear that it is unwilling to restrict the trial courts to any single basis for determining fair market value, preferring instead to afford trial courts considerable discretion to select the method of valuation that is most appropriate in the light of the facts of the particular case. The selected method of valuation may be a single method or some combination of different methods.

Cane Tennessee, 71 Fed. Cl. at 439 (quoting Barrett Refining Corp. v. United States, 242 F.3d 1055, 1061 (Fed. Cir. 2001) and Seravalli v. United States, 845 F.2d 1571, 1575 (Fed. Cir. 1988)) (internal quotation marks omitted).

[152] The recoupment of cost basis approach is somewhat of a hybrid of the two other approaches in the sense that it comprises both a comparison of market values and analysis of the return on an investment (non-negative, zero percent return). However, the courts generally apply the cost basis approach only as a matter of convenience to bolster their "preexisting disposition to find no taking based on comparison of before-value and after-value." Meltz, *supra* note 91, at 338.

[153] Meltz, *supra* note 91, at 336. Echeverria actually describes the test in somewhat different terms: "the difference, as of the date of the alleged taking, between the 'fair market value' of the property (1) subject to the regulatory constraint being challenged, and (2) assuming the regulation being challenged did not apply." *See* Echeverria, *supra* note 123, at 180. But his different construction, which highlights the issue of reciprocal values created by certain regulations, is not significant in light of the scope of this Note.

[154] Olson v. United States, 292 U.S. 246, 255 (1934). *See also* United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 405–06 (1949); Meltz, *supra* note 91, at 336.

But determining the "highest and most profitable use" of a parcel of property can be a difficult, imperfect, and contentious process.[155] As a result, the courts adopted the idea of "fair market value."[156] Fair market value has been defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[157]

It follows that the most popular method of determining market value with and without a regulatory burden is the comparable sales approach, whereby the value of the property is determined by comparing sales of certain parcels of land that are similarly situated to the land the claimant alleged to have been taken.[158] The comparable sales approach generally consists of a review of a variety of property sales in the area, from which only some are chosen for comparison.[159] As a result, to use the comparable sales approach, there must be a market for the type of property at issue.[160] Where there are not enough sales of similarly situated property to make accurate price comparisons, then there is "no market" for that property, and other means of determining market value may be relevant to what a prospective purchaser would have paid, such as evidence of scattered or sparse sales.[161] However, scattered or sparse sales are given less weight in establishing the value of the property allegedly taken.[162]

This issue is particularly significant in the context of emerging markets. The revenue potential of conservation easements is unlikely to be considered in a common appraisal. Therefore, the impact that conservation easements will have upon the regulatory takings analysis is harnessed to the

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[155] United States v. Miller, 317 U.S. 369, 374 (1943) (cautioning that the "assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety").

[156] *See, e.g.*, *Olson*, 292 U.S. at 255; Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001); City of Monterey v. Del Monte Dunes, 526 U.S. 687, 734 (1999) (Souter, J., concurring in part and dissenting in part).

[157] United States v. Cartwright, 411 U.S. 546, 551 (1973) (quoting 26 C.F.R. § 20.2031-1(b)).

[158] Meltz, *supra* note 91, at 336.

[159] Cane Tennessee, Inc. v. United States, 71 Fed. Cl. 432, 446 (2005). When comparing the properties, adjustments are made for factors such as property location, size, and terrain. *Id.* Professional appraisers, as expert witnesses, generally do most of the leg work in establishing the evidence necessary to analyze a taking under the comparable sales approach. *See, e.g., id.*

[160] *See infra* Part IV.C.

[161] United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402 (1949).

[162] *Id.*

development of these markets. That being said, the impact of these emerging markets stands to be considerably greater if a court employs the comparable sales analysis than if a court employs the investment capitalization approach discussed in the next Section.

b. *Investment Capitalization Approach*

Under this approach, which is informed by both the "economic impact" and "expectations" prongs of the *Penn Central* test, courts focus on the degree to which a regulation affects a particular investment. This approach may have its origins in the text of the *Penn Central* opinion, which states in support of denying the taking claim: "[O]n this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment."[163] However, the approach itself is problematic.[164] Profitability has not traditionally been recognized as a protected property interest under the Takings Clause.[165] Furthermore, *Penn Central* did not declare that an individual is entitled to profits or a reasonable return on an investment—rather, the Court merely cited evidence of a reasonable return as support that a taking had not occurred.[166]

Despite its problems, the investment capitalization approach is still being applied. It is most often applied when a claimant alleges that a regulation restricts an already existing property use, such as a going business concern.[167] For example, in *Rose Acre Farms, Inc. v. United States*,[168] the

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[163] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

[164] *See* Echeverria, *supra* note 123, at 182.

[165] *See id. See also, e.g.*, Andrus v. Allard, 444 U.S. 51, 66 (1979) ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim."). In the context of due process under the Fourteenth Amendment, the Supreme Court has found that while a business's assets are property subject to deprivation, neither the activity of doing business nor of making a profit is property subject to deprivation. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).

[166] *Penn Cent.*, 438 U.S. at 149. Justice Rehnquist, in his dissent, argued that individuals are entitled to a reasonable return on their investment. *Id.* at 149 (Rehnquist, J., dissenting) ("The Court has frequently held that, even where a destruction of property rights would not otherwise constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment.") (citing United States v. Lynah, 188 U.S. 445, 470 (1903)) (emphasis omitted). *See also, e.g.*, Lingle, 544 U.S. at 544 (2005).

[167] Meltz, *supra* note 91, at 337. *See, e.g.*, Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1190 (Fed. Cir. 2004) (remanding for determination of whether regulatory burden upon a chicken farming business is best measured by a decline in market value or

U.S. Court of Appeals for the Federal Circuit determined the economic impact of health regulations on a chicken farming business through a comparison of the plaintiff's actual earning with the projected earnings if the restrictions were not in place.[169] If a court were to take this approach when determining the economic impact of a highly restrictive environmental regulation, the government would likely lose.[170] However, because the market for conservation easements is geared more towards undeveloped land, and a going business concern is more likely to exist on developed land, this test is less of a concern for the purposes of this Note.[171]

3. *Degree of Loss Required: When Regulation Has Gone "Too Far"*

In the absence of a bright line dividing compensable from noncompensable regulatory actions, the courts, as discussed in the preceding section, turn to an examination of empirical evidence to determine the severity of the economic impact upon the affected property.[172] And while there is no percentage of value loss that, once reached, results in a per se taking—other than a total economic wipeout[173]—it is generally understood that only severe economic impacts can establish regulatory takings.[174] The *Lingle* decision, emphasizing the severity necessary to establish a taking, stated that the goal of regulatory takings analysis is to identify regulatory

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business profitability), *cert. denied*, 545 U.S. 1104 (2005). On remand, the trial court found that the investment capitalization approach was more appropriate for measuring the economic impact on a "going business concern." Rose Acre Farms, Inc. v. United States, No. 92-710C, 2007 WL 5177409, at *6 (Fed. Cl. Jul. 11, 2007) (quoting *Rose Acre Farms*, 373 F.3d at 1188–89). *See also, e.g.*, Cienega Gardens v. United States, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that a 96% loss in the rate of return on an investment was a sufficient economic impact to warrant just compensation).

[168] 373 F.3d 1177, 1184–90 (Fed. Cir. 2004).

[169] Rose Acre Farms, 2007 WL 5177409 at *6–8.

[170] *See, e.g., id.*

[171] There are, however, some industries that operate on the type of land that purchasers of conservation easements heavily desire. Some examples include the logging industry, the mining industry, and several sectors of the energy industry. *See* U.S. SMALL BUSINESS ADMINISTRATION, LENDER AND DEVELOPMENT COMPANY LOAN PROGRAMS app. at 329 (2008), *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sops_50105.pdf.

[172] *See* Wade, *supra* note 11, at 349.

[173] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

[174] *See* Echeverria, *supra* note 123, at 178; Meltz, *supra* note 91, at 334 ("The Court has said several things . . . indicating that the economic impact generally must be very substantial, or arguably severe, where the other *Penn Central* factors are not determinative.") (emphasis omitted).

actions that are so burdensome that they are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[175] This strong language both reflects the high degree of economic impact that most courts require to find a taking[176] and, perhaps, suggests that the standard may move even higher.[177] Because two different methods of calculating value loss were discussed in the preceding section, this section will examine two different standards of loss required to establish a taking—one under the comparable sales approach and one under the investment capitalization approach.

a. *Degree of Loss Required Under the Comparable Sales Approach*

Applying the comparable sales approach to loss valuations, the Supreme Court has indicated that reductions in value of over seventy, eighty, and even ninety percent are not necessarily so severe as to constitute a taking.[178] The Colorado Supreme Court has summarized U.S. Supreme Court precedent as "provid[ing] an avenue of redress [only] for a landowner whose property retains value that is slightly greater than de minimis," a test that is reserved for the "truly unusual case."[179] And the U.S. Court of Federal Claims, which handles most takings claims against the federal government and routinely applies the comparable sales approach, generally requires a diminution in value "well in excess of 85 percent before finding a regulatory taking."[180]

Emphasizing the high degree of loss required, *Lingle* declared that regulatory takings occur only when the economic impact is so severe as to be "functionally equivalent" to a direct appropriation.[181] While the opinion as a

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[175] Lingle v. Chevron, 544 U.S. 528, 539 (2005).

[176] *See* Echeverria, *supra* note 123, at 178; Meltz, *supra* note 91, at 334.

[177] *See supra* note 74 and accompanying text; Echeverria, *supra* note 123, at 178; Meltz, *supra* note 91, at 334.

[178] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (finding no taking despite 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (finding no taking despite 92.5% diminution in value).

[179] Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs of County of La Plata, 38 P.3d 59, 65–66 (Colo. 2001). *See also* K & K Const., Inc. v. Dep't. of Envtl. Quality, 705 N.W.2d 365, 377–78 (Mich. App. 2005), *cert. denied*, 127 S. Ct. 1928 (2007), *reh'g denied*, 127 S. Ct. 2906 (2007) (finding no taking despite 67% diminution in value); Wyer v. Bd. of Envtl. Prot., 747 A.2d 192, 193 (Me. 2000) (holding parking, picnics, barbecues, and other recreational uses were sufficiently valuable to avoid a "taking" despite a strict non-development regulation).

[180] Walcek v. United States, 49 Fed. Cl. 248, 271 (2001).

[181] Lingle v. Chevron, 544 U.S. 528, 539 (2005). Elsewhere, the Court has said that land use regulations amount to takings in "extreme circumstances." *See, e.g.*, United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985).

whole will likely have the effect of focusing the regulatory takings analysis more directly upon the severity of economic loss resulting from a given regulation,[182] this language, in particular, strongly suggests that the Court will continue to find takings only in extraordinary circumstances where the diminution in value is extreme. As Robert Meltz has succinctly pointed out, "[i]t is difficult to argue that small to moderate economic impacts are the functional equivalents of appropriations or ousters."[183] As a result, it will be interesting to see if, going forward, *Lingle* results in the application of a higher threshold for successful takings in the courts.[184] For now, however, it is safe to assume that courts applying the comparable sales approach will find takings only in the extraordinary circumstance that a regulation results in at least a seventy-five percent diminution in the value of the claimant's property—and some courts may require more diminution.

b. *Degree of Loss Required Under the Investment Capitalization Approach*

When a taking is found despite a less-than-seventy-five percent diminution in the property's market value, it is generally because the court takes the investment capitalization approach. The investment capitalization approach is most significant in two situations: (1) when the claimant recently purchased the property[185] with the intent to profitably use or develop the land but has yet to realize a reasonable return on the original investment;[186] and (2) when the regulation has restricted the claimant's already profitable use of the land.[187] Under the investment capitalization approach, the court does not focus upon the diminution in the market value of the affected property, but rather upon the diminution in the profitability of the property.

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[182] *See supra* notes 126–27 and accompanying text.

[183] Meltz, *supra* note 91, at 334.

[184] *See supra* note 74 and accompanying text.

[185] If the claimant has held the property at issue for a long time, and that property is undeveloped, then the courts may apply the cost basis approach, in which case the government is likely to win due to appreciation and the speculative value that exists for practically all land today regardless of the regulatory encumbrances. *See* Meltz, *supra* note 91, at 337–38.

[186] *See, e.g.*, Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 38, 43 (1999) (concluding that a 73.1% diminution in value was indicative of a *Penn Central* taking because the owner could only recoup half of its original investment in the property).

[187] *See, e.g.*, Rose Acre Farms, Inc. v. United States, 75 Fed. Cl. 527, 534, 536 (2007) (concluding that a 219.2% diminution in profit was indicative of a *Penn Central* taking).

The "reasonable investment-backed expectations" prong of the *Penn Central* test has a significant influence on the courts' analysis under the investment capitalization approach.[188] If it is determined that the claimant could not have reasonably expected to receive a return on the investment—or realize a profit from the endeavor—then the court is unlikely to find a taking under the investment capitalization approach.[189] If the claimant was reasonable in expecting a return on the investment, then the court must determine what return would be reasonable, which is generally calculated using expert testimony and provided as a percentage of the investment.[190] The difference, then, between the actual return and the reasonable return represents the diminution in value of the claimant's property.[191] As with the comparable sales approach, the line at which a diminution in return becomes a taking seems to be around seventy-five percent.[192] However, some commentators have suggested that an economic impact is severe enough to require compensation *whenever* a government action prohibits an owner from realizing a reasonable return on the investment in the affected parcel.[193] Regardless of the exact application, the investment capitalization approach has generally meant success for the claimant.

IV. EXAMINING THE SIGNIFICANCE OF CONSERVATION EASEMENTS IN THE REGULATORY TAKINGS FRAMEWORK

The purpose of this Note is to examine the potential impact that conservation easements may have upon a regulatory takings analysis. Specifically, this Note asks whether conservation easements represent a potential economic use for regulated land that lessens the economic impact of environmental regulations. A preliminary search revealed no case law in which a government entity has argued that conservation easements provide a source of value to the encumbered property owner. Furthermore, it is not my

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188 *See* Echeverria, *supra* note 127, at 184.

189 *Id.*

190 *See, e.g., Rose Acre Farms,* 75 Fed. Cl. at 534. For a more detailed analysis of this process, *see* Wade, *supra* note 11. Dr. Wade is a resource economist who has served as an expert witness for plaintiffs counsel in several takings cases. *Id.* at 337 n.*. Dr. Wade's article examines the perceived advances in economic analysis that have been made over the course of the past few decades in the Federal Claims and Circuit Courts. *Id.* at 337.

191 *See, e.g., Rose Acre Farms,* 75 Fed. Cl. at 534.

192 *See generally* Cienega Gardens v. United States, 331 F.3d 1319, 1345 (Fed. Cir. 2003) (noting that a less than 75% diminution is not an automatic barrier to compensation, but recognizing that the figure can serve as a guidepost).

193 *See* Wade, *supra* note 11, at 347.

intention to merely make predictions as to how a court would receive such an argument. Instead, the purpose of this examination is to highlight the issues that would arise in the context of such an argument. It is important to examine the possible economic values of conserved land because, due to the Supreme Court's decision in *Lingle*, the regulatory takings analysis is likely to be almost entirely focused upon the economic impact of regulatory restrictions. Thus, this section begins with a general review of conservation easements. Using that review as a foundation, this section turns to an examination of whether conservation easements represent an economic use for regulated land and, if so, whether that use is valuable in such a way as to affect a takings review under either the *Lucas* test or the *Penn Central* test.

A. *Conservation Easements: An Introduction*

A conservation easement is a legal contract that entails the transfer of certain "sticks" in the "bundle of rights" associated with the ownership of private property and is therefore a "partial interest" in land.[194] The property owner, or grantor of the easement, retains the possessory interest in the land while transferring to the grantee the right to prevent the grantor or anyone else from engaging in certain activities that would be detrimental to the grantee's conservation goals.[195] The activities prohibited by the conservation easement vary according to the contract—some easements may prohibit all ground-disturbing activities while others may allow for farming or sustainable logging.[196] Some easements may also provide affirmative rights to the grantee, for example, the right to study, preserve, or restore the conservation value of the encumbered property.[197]

Perhaps the most unique characteristic of modern conservation easements is the fact that most are drafted to protect the land they encumber in perpetuity, thereby providing the grantee with more permanent and less costly land protection than term contracts.[198] Though conservation easements

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[194] Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 440 (2002).

[195] *Id.*; *see also* James Boyd, Kathryn Caballero & R. David Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 215 (2000).

[196] Cheever, *supra* note 194, at 440.

[197] *Id.* at 442. Often times, contracting for these rights can be difficult. *See* Boyd, Cabellero & Simpson, *supra* note 195, at 215. Perhaps even more problematic is the fact that these terms are often difficult to both monitor and enforce. *Id.*

[198] Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 675 (2007). McLaughlin notes that perpetuity is also desirable from the perspective of the grantor. *Id.* Grantors are only eligible for the federal tax benefits

have been used in the United States since the late nineteenth century, today's perpetual easements may not be valid under most states' common law systems, many of which reflect the long-standing policy against undue, or "dead-hand," restraints on landowners' ability to transfer real property.[199] Perpetual conservation easements, therefore, exist mostly as a result of the Uniform Conservation Easement Act of 1981 (UCEA) and the subsequent state statutes modeled after it, which were generally designed to supersede the common law restrictions on perpetual easements.[200]

The UCEA establishes two requirements that are unique to conservation easements. First, all conservation easements must identify a conservation purpose, for example, protecting natural resources, enhancing air and water quality, or assuring the property's availability for agricultural, forest, recreational, or open-space use.[201] Second, conservation easements may only be granted to qualified holders.[202] A qualified holder is either a governmental body or a charitable organization with a conservation purpose.[203] Thus, under the UCEA, private individuals cannot hold conservation easements.[204] Most qualified holders of conservation easements are land trusts—private non-profit organizations formed at the local, state, and national levels and created for the purpose of conserving a certain type or tract of land that is important to the community it serves.[205]

There are many reasons why conservation easements are a popular method of conserving land: (1) they are less costly than purchasing fee interests outright; (2) they do not require additional administrative resources;

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associated with conservation easements if the easements are expressly perpetual. *Id.* Furthermore, she cites studies indicating that permanent protection of cherished land is one of the primary factors motivating grantors of conservation easements. *Id.* at 676.

[199] Jane Prohaska, *Conservation Easements: An Overview*, SM041 ALI-ABA 5, *12–13 (2006); Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 276 (2007).

[200] Vinson, *supra* note 199, at 276. Twenty-four jurisdictions have adopted the UCEA while many other states have adopted versions of it. Prohaska, *supra* note 199, at *12. The requirements of some state laws vary from the provisions of the UCEA; for example, the Massachusetts law requires government approval of privately held easements. *Id.* at *13.

[201] UNIF. CONSERVATION EASEMENT ACT OF 1981 § 1.1, § 1 cmt., 12 U.L.A. 171 (1996).

[202] *Id.* § 1 cmt.

[203] *Id.* § 1.2.

[204] Prohaska, *supra* note 199, at *14.

[205] LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS REPORT 3 (2005), http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf [hereinafter 2005 LAND TRUST CENSUS].

(3) based primarily on contract law, they require limited statutory attention; and (4) because they are voluntarily undertaken, they do not represent a government intrusion upon property rights.[206] There are also, however, many challenging and problematic aspects to the use of conservation easements. First, the contracting costs associated with the division of ownership rights are high because, due to the long-term effectiveness of the easement, the contract must account and provide remedies for future conflicts between the landowners and the conservators.[207] Second, because they are based upon voluntary actions, conservation easements cannot be used to address one of the primary challenges facing conservators: dealing with the "hold out"—the individual or firm that prefers not to join the community efforts to protect the environment.[208] Along the same lines, the individuals who are most likely to voluntarily surrender development rights are those who think they will be burdened the least by the restrictions.[209] The burden, here, represents primarily the degree to which the individuals would have to change their land use plans under the terms of the conservation easement.[210] It follows that conservation easements, used alone, are unlikely to achieve drastic changes in land use.[211] Therefore, conservation easements are most effective in protecting undeveloped land that is owned by an individual or firm that does not plan on developing their land.

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[206] *See* Boyd, Cabellero & Simpson, *supra* note 195, at 219. *See also* Vinson, *supra* note 199, at 286–301.

[207] Some estimates have shown that contracting costs can amount to 4% of the easement's overall value. *See* Boyd, Cabellero & Simpson, *supra* note 195, at 219 (quoting Lancaster County Agric. Pres. Bd., *200 Farms and over 17,000 Acres Now Preserved*, AGRICULTURAL PRESERVE BOARD NEWS, Summer 1994, at 1).

[208] John Echeverria, *Skeptic's Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE, Aug. 31, 2005, http://ecosystemmarketplace.com/pages/article.opinion.php?component_id=3822&component_version_id=5435&language_id=12.

[209] *See id.*

[210] *See id.*

[211] *See id.* It must be noted that the skepticism of conservation easements that Echeverria expresses in this article arises in large part because he is analyzing their utility in the context of large scale environmental problems. *See id.* Large scale environmental problems are caused by damaging land uses. *See id.* As a result, he finds that, because "those most likely to change land uses in the near future will be least likely to volunteer," the conservation easement movement is devoting conservation resources to the wrong individuals and would be better directing their efforts towards those individuals more likely to take up damaging land uses. *See id.* This is a valid point, but in the regulatory takings context, the individual's desire to change his land use has been frustrated and as a result, the voluntariness problem is somewhat diminished. Thus, this Note envisions a cooperative relationship between the land trusts and the legislatures to achieve better overall protection of the environment.

Despite its problems, the use of easements as a land conservation method is increasing at an incredible rate.[212] Federal and state tax credits for the donation of conservation easements are the driving force behind this increasingly popular conservation method.[213] The donation of a conservation easement may constitute a charitable gift that is deductible for federal and state income tax purposes so long as the property and easement meet certain criteria.[214] While most conservation easements today are donated, many land trusts and governmental entities are also in the business of purchasing them.[215] Most conservation easements are donated rather than sold because government entities and land trusts generally have limited funds to put towards the outright purchase of conservation easements. Furthermore, these organizations must account for the stewardship costs associated with supervised land, which is a substantial concern.[216] Certainly, for conservation

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[212] Vinson, *supra* note 199, at 275. In 1950, there were only 53 land trusts in existence. 2005 LAND TRUST CENSUS, *supra* note 205, at 12. By 2000, that number exceeded 1200, and in the five years between 2000 and 2005, another 400 land trusts were established, bringing the total to 1,667. *Id.* at 4. In 2000, there were 2,514,545 acres under easement by local and state land trusts. *Id.* at 8. By 2005, that number increased by 148% to 6,245,969 acres. *Id.*

[213] *See* 2005 LAND TRUST CENSUS, *supra* note 205, at 8. The Land Trust Alliance has put forth a substantial effort towards expanding the tax benefits of donating conservation easements and was awarded in 2006 with a congressional bill that provided expanded relief. *See also* LAND TRUST ALLIANCE, 2006 ANNUAL REPORT 4 (2006), http://www.landtrustalliance.org/about-us/who-we-are/2006-annual-report/at_download/file (last visited Nov. 17, 2008). Many states have incorporated deductions into the law as well, which also serve as considerable motivation for the donation of conservation easements. *See, e.g.*, Illana Poley, *Conservation Easements Protect Colorado Open Space at Year-End*, CHERRY CREEK NEWS, Jan. 7, 2008, *available at* http://www.thecherrycreeknews.com/content/view/134/52/ (describing the "flurry of year-end activity to finalize conservation easements" in Colorado that resulted from a change in the law, going into effect Jan. 1, 2008, that would raise the tax standards).

[214] *See* Stephen J. Small, *Proper—and Improper—Deductions for Conservation Donations, Including Developer Donations*, TAX NOTES, at 221 (Oct. 11, 2004), *available at* http://www.stevesmall.com/uploads/22.pdf. The value of the gift, as determined by a qualified appraisal, is equal to the difference between the fair market value of the property before and after the easement is donated. *Id.*

[215] *See* Cheever, *supra* note 194, at 432. *See also, e.g.*, THE NATURE CONSERVANCY, ALL ABOUT CONSERVATION EASEMENTS, http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html (last visited on Nov. 17, 2008). *See also* LAND TRUST ALLIANCE, CONSERVATION OPTIONS FOR LANDOWNERS, http://www.lta.org/conserve/options.htm#easement (last visited Oct. 12, 2007). When land trusts do purchase interests in land, it is generally in the form of a "bargain" purchase of land, whereby the land trust purchases a fee simple interest in property at a price lower than its fair market value. *Id.*

[216] *See* Echeverria, *supra* note 208.

easements to play a very significant role in takings analysis, the funding of conservation land trusts and/or governmental purchasing programs must be increased. However, this Note does not investigate ways in which that can be accomplished. Instead, this Note examines the problems and/or issues that arise as a result of that lack of funding.

B. *Tax Benefits: No Place in the Regulatory Takings Framework*

Conservation easements do not represent a "free market solution" to environmental problems.[217] Most conservation easements are voluntarily donated because of the tax benefits that such donations provide for the donor, and as a result, "[t]he lion's share of the funding for easements . . . comes out of the pocket of the taxpayer."[218] Because development rights are often very valuable assets, the amount of these charitable donations, and the resulting tax benefits they provide, can be quite large.[219]

However, these tax benefits would not be realized by an individual whose land has been strictly regulated. The income tax benefits would not apply because if the donor could not, for example, build on the encumbered property in the first place, there would be no appreciable dollar value given up in the transaction, which is the basis of the income tax deduction.[220] Because a takings claimant would not be able to realize these tax benefits, the source of a conservation easement's economic value in the takings analysis must reside in the ability to sell it.[221]

C. *Is There a Market for Conservation Easements—Could There Be a Market?*

Because tax benefits are not available to a takings claimant, the crucial question becomes whether a "market" for selling conservation easements truly exists. If the owner of a regulated parcel cannot sell the development rights to his property, then the courts are unlikely to find that conservation

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[217] Echeverria, *supra* note 208.

[218] *Id.*

[219] The deduction a landowner can take for donating a conservation easement is 30% of his or her adjusted gross income. Upper Valley Land Trust, http://www.uvlt.org/ (last visited Nov. 17, 2008). *See also* 26 U.S.C. § 170(h) (2003).

[220] *See* Small, *supra* note 214, at 221.

[221] *See, e.g.*, THE NATURE CONSERVANCY, ALL ABOUT CONSERVATION EASEMENTS, *supra* note 215. *See also*, Margaret Jackson, *Ranchers Rush to Secure Conservation Easements*, THE DENVER POST, Nov. 4, 2007 at 1C (reporting the rush to secure conservation easements before the temporary increase in federal income tax benefits expired).

easements provide any economic use. The idea of "economic use" plays an important role in the regulatory takings analysis under both the *Lucas*[222] and *Penn Central*[223] test. If a regulation leaves a landowner with any "economically viable use" of his land, then a taking cannot be found under *Lucas*.[224] And under the "economic impact" prong of *Penn Central*, the remaining "economic uses" of a regulated parcel are factored in any calculation of the diminution in market value.[225] Thus, if conservation easements represent a remaining economic use, then they may support the defeat of a takings claim.

In order for the sale of conservation easements to represent an economic use, the government must show that the regulated parcel is both (1) "physically adaptable for such use" and (2) that there is a "demand for such use in the reasonably near future."[226] Because an easement transaction is selling a property interest, the "physically adaptable" aspect of this test is not particularly important, unless, for example, the development rights on the affected parcel have already been sold to another purchaser, in which case it would be "physically" impossible to sell them again.[227]

The second aspect of the test, however, is extremely significant in the context of conservation easements because the demand for such easements is particularized and tenuous. The most common way of determining whether demand exists for a particular use is to examine whether a significant number of individuals would be willing to purchase the property in spite of the land use restrictions.[228] Because conservation easements serve a particular purpose, and the potential buyers have limited purchasing power, the development rights on only certain parcels of land are likely to be purchased. Therefore, it must first be determined whether the regulated property is "conservation-worthy"—that is—does the property have ecological qualities deserving conservation? For semi-pristine, undeveloped land, this question would pose little problem. But where the regulated parcel has been developed, polluted, or otherwise harmed—or where a significant investment would be required to rehabilitate the ecological integrity of the parcel—then

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[222] *See supra* Part III.A.

[223] *See supra* Part III.B.1.

[224] Lucas, 505 U.S. 1003, 1015 (1992).

[225] Walcek v. United States, 49 Fed. Cl. 248, 262 (2001).

[226] *Id.* (quoting Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 158 (1990)).

[227] "Physical adaptability" may not be found if there are unreasonable or unattainable prerequisites for using the land in the alleged manner. *Id.*

[228] *See* Meltz, *supra* note 91, at 336. *See also, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff'd in part, rev'd in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

the development rights on that parcel of land are unlikely to elicit any demand on the conservation easement "market."

The more crucial inquiry, however, is whether there is a reasonable probability that potential buyers will have sufficient funds to purchase the development rights of the regulated parcel in the near future. If it is determined that the "market" for conservation easements amounts to mere speculation or conjecture, then the sale of an easement will not be considered a viable economic use and a taking will be found under the *Lucas* test.[229] Likewise, under the "economic impact" prong of the *Penn Central* test, courts generally use the comparable sales approach, which requires the existence of a market for the type of property at issue. If there are no comparable sales of conservation easements in the area of the allegedly taken land, then the courts will not consider such a sale in the value of the claimant's post-regulation property.

No one can argue that conservation easements are currently bought and sold on a competitive market.[230] As discussed in the preceding section, most conservation easements today are donated to land trusts for tax purposes. More often than not, the purchaser of conservation easements is a local land trust that operates as the lone purchaser of conservation easements in the community[231]—hence, no competition. And, perhaps most importantly, there is the question of whether a land trust, when faced with the decision to expend some of its limited funds to secure an easement, would choose to spend those funds on a regulated parcel or on a non-regulated parcel. Most likely, the choice would be the latter. The goal of most land trusts is conservation—as much conservation as possible.[232] Therefore, many land trust organizations may treat the passing of a restrictive environmental regulation as a victory, and as a result, place no further efforts towards securing the ecological qualities of the properties affected by the regulation. This is especially true with land trusts that operate on a national scale since

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[229] United States v. 341.45 Acres, 633 F.2d 108, 108 (8th Cir. 1980).

[230] *See* Cheever, *supra* note 194, at 432. Cheever, reflecting upon the "market" for conservation easements, states:

> I am not asserting that land trusts and government entities do not pay money for conservation servitudes. . . . [Moreover] I am sufficiently steeped in the economic tradition to expect that the purchasers of conservation easements—private land trusts and local government—would compete with each other by offering the owners of particularly spectacular parcels of land "better deals" to encumber their land. Yet, in my experience, I have encountered no evidence of this kind of competition.

Id. See also Echeverria, *supra* note 208.

[231] *See* Vinson, *supra* note 199, at 275.

[232] *See, e.g.*, THE NATURE CONSERVANCY, WHERE WE WORK, http://www.nature.org/wherewework/?src=t3 (last visited Nov. 17, 2008).

they tend to focus on conservation of particular types—rather than particular parcels—of property.[233] As a result, there is a significant possibility that whatever "market" which may exist for conservation easements on non-regulated parcels of land may disappear once development on that property is restricted by governmental regulation.

There are, however, several reasons why an individual purchaser may be available for the takings claimant. First, the land trust might, though doubtfully, decide to purchase the conservation easement regardless of the regulation. There are several reasons which might support such a decision: conservation easements are held in perpetuity, while regulatory policies can change with each passing election; enforcement of land use restrictions can be spotty, for example, variances can be given; conservation easements may allow access and stewardship where land use restrictions may not; and finally, easements purchased from an individual whose land has allegedly been taken are likely to be cheaper than when purchased from an unencumbered landowner.[234] Furthermore, as urban areas continue to expand outward, two things happen to undeveloped, open space that increases the value of conservation easements: (1) with less undeveloped land to protect, land trusts will be able to focus their efforts upon a smaller portion of land, and (2) as the amount of undeveloped land declines, the appreciation of open space will grow, and so too will the desire to preserve it.[235] Thus, as the supply of conservation-worthy land declines, the demand will increase and come closer to meeting the actual fair market value of the development rights.[236]

Second, some states and municipalities have programs whereby developers must mitigate the environmental damage caused by any approved development.[237] Sometimes, this mitigation may be met by purchasing conservation easements on land elsewhere in the jurisdiction.[238] If states and

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[233] *See, e.g.* THE NATURE CONSERVANCY, FINAL REPORT: CONSERVATION EASEMENT WORKING GROUP, 6–9 (Apr. 29, 2004), http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/files/easements_report.pdf (last visited Nov. 17, 2008).

[234] A conservation easement on unencumbered property typically costs half as much as an outright purchase, whereas to avoid a taking, land trusts would need to offer only 15–25% of an outright purchase on encumbered property. *See* Daphne Sashin, *Ag Chief: Let's Pay Farmers*, ORLANDO SENTINEL, Mar. 1, 2008, at B1, *available at* 2008 WLNR 4116341.

[235] Boyd, Cabellero & Simpson, *supra* note 195, at 210.

[236] Vinson, *supra* note 199, at 276–77.

[237] *See, e.g.*, Frank Dobrovnik, *Super-Duper Wal-Mart to Cast Its Shadow on Tiny Sault, Mich.*, THE SAULT STAR, Mar. 7, 2008, at A3.

[238] *Id.*

municipalities lifted restrictions on those purchases, that would go a long way towards building a more fluent market for conservation easements. This could foster a relationship between local control of development (causing demand for conservation easements) and federal management of the environment (causing supply for conservation easements).

D. *If There Were a Market, What Are the Implications?*

Assuming that there is a market, the most common approach to determining the economic impact of a governmental regulation on a property is to compare the fair market value of the property before the land-use restrictions were imposed with the fair market value afterward.[239] Fair market value has been defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[240] Courts applying the comparable sales approach will find takings only in the extraordinary circumstance where a regulation results in at least a seventy-five percent diminution in the value of the claimant's property—and some courts may require more diminution.

This is the most interesting aspect of the analysis. Because the courts generally will not find a taking unless at least seventy-five percent of the value in the claimant's property has been diminished, a market for conservation easements that could account for the twenty-five percent that it takes to frustrate takings claims would practically nullify all takings claims filed in response to environmental regulations. While twenty-five percent is still a considerable amount of money, it is much, much less than the amount of "just compensation" money that it would take the government to exercise its eminent domain power and condemn the same property.

There are more than just monetary advantages to this approach. Because the land trusts are generally community-oriented, and would obtain the stewardship responsibilities for the regulated tracts of land, the conservation of that land will likely be undertaken with greater care than when a distant state or federal governmental entity assumes stewardship responsibility.

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[239] Meltz, *supra* note 91, at 336. Echeverria actually describes the test in somewhat different terms: "[T]he difference, as of the date of the alleged taking, between the 'fair market value' of the property (1) subject to the regulatory constraint being challenged, and (2) assuming the regulation being challenged did not apply." John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 180 (2005). But his different construction, which highlights the issue of reciprocal values created by certain regulations, is not significant in light of the scope of this Note.

[240] United States v. Cartwright, 411 U.S. 546, 551 (1973) (quoting 26 C.F.R. § 20.2031-1(b)).

Individuals tend to take more pride in something when they feel they have a working connection to it.[241]

Furthermore, this setup would cut down on the regulating entities' transaction costs. These entities could pass, for example, somewhat general development restrictions, which would allow the community-based land trusts to establish the particular extent of the regulation via the conservation easement negotiation. Most environmental regulations generally take local input into consideration when establishing rules. It may be more efficient to separate the process. For example, the larger-scale regulating entities would establish the scientific-based parameters within which use may occur without endangering the ecological qualities sought to be protected.[242] Then, the local conservation land trust, a community-based group, would use the contractual process to establish more specifically the restrictions upon each of the individuals with affected property.[243] This process may have the added benefit of calming the anger that generally arises when an individual's land use is restricted by the government.[244]

V. CONCLUSION

Whether or not conservation easements will have an impact on the regulatory takings analysis depends in large part upon whether a court will find that a "market" for them exists. The two most important issues with

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[241] ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, & AMERICA'S PUBLIC LANDS 244–48 (2003) (discussing the advantages of collaborative processes that involve both federal land management agencies and local communities, including examples of programs that have successfully implemented a more collaborative approach to environmental conservation).

[242] While Keiter strongly supports local community-based conservation efforts, he also recognizes that such initiatives must include the participation of both local and federal authorities because, inter alia, some environmental and land management problems are national in scope and therefore necessitate national intervention, for example, in the form of national standard-setting. *See id.* at 303–06. *See also* Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. (forthcoming Dec. 2008) (discussing why "nested scales" of ecosystem management are more appropriate for dealing with the ever more complex "nested systems of nature" that humans uncover and attempt to manage) (on file with author).

[243] *See* KEITER, *supra* note 241, at 246 (explaining the benefits of involving local communities in ecosystem management, including the ability to uncover and consider information beyond the scope of a federal agency and provide "a forum where new resource management policies and proposals can be tested and shaped to fit local circumstances").

[244] *Id.* (arguing that collaborative land management between local communities and federal agencies can "strengthen community relationships [and] help reduce acrimony").

regard to whether there is a "market" for conservation easements are: (1) whether the potential purchasers of conservation easements—government entities and conservation land trusts—have sufficient funding to, in fact, purchase easements on the allegedly taken land; and (2) whether, assuming such funding did in fact exist, these purchasers would decide to purchase easements on encumbered property, or rather, would direct that funding to unencumbered property. If these questions are addressed, and a market in conservation easements were to be more fully developed, the degree to which land use may be restricted without requiring just compensation would increase.

Moreover, adopting a policy whereby a market in conservation easements is developed for the purpose of defeating takings claims would provide several advantages. First, purchasing conservation easements on regulated property is likely to be far cheaper than condemning land and paying just compensation payments. Second, allowing land trusts to handle the negotiation of conservation easements on individual parcels of land would cut down on the administrative costs of regulating the land from the top down. Regulatory agencies would not need to involve stakeholders as much, focusing instead upon the science-based parameters for protecting the ecological qualities in a particular region. Finally, because land trusts are generally local community groups, the stewardship they would provide on the protected lands would be done with more care than if that stewardship would be done solely by the regulatory agencies. For all these reasons, public support for a market in conservation easements is an intriguing prospect.